BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUSAN L. WOODWARD	)	
Claimant	)	
VS.	)	
	)	Docket No. 268,439
JIM'S FORMAL WEAR	)	
Respondent	)	
AND	)	
	)	
SAFECO INSURANCE COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 26, 2003 Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on April 27, 2004.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Clifford K. Stubbs of Roeland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Moreover, at oral argument before the Board, the parties agreed, as follows:

1. The functional impairment opinion provided by Dr. J. Mark Melhorn is not part of the record as the doctor did not testify.

2. After the accident that is the subject of this claim, claimant worked for another employer, Amoco, from November 15, 2001, through May 1, 2002. And while working for that employer, claimant's post-injury average weekly wage was $252 per week (36 hours per week at $7 per hour).

3. Following the accident, claimant worked for another employer, Service Master, from June 24, 2002, through December 15, 2002.

4. On August 25, 2003, claimant began working at a local motel through a temporary employment agency, which paid her $135 per week (22.5 hours per week at $6 per hour).

ISSUES

This is a claim for a series of injuries to claimant's neck and right shoulder culminating in disability on or about April 30, 2001. In the November 26, 2003 Award, Judge Moore determined claimant was entitled to receive permanent disability benefits for a five percent whole body functional impairment through November 25, 2002, followed by benefits for a 51.25 percent work disability (a permanent partial general disability greater than the functional impairment rating).

Respondent argues Judge Moore erred. Respondent argues claimant obtained work with other employers following her accident that paid her wages that were comparable to her pre-injury average weekly wage. Respondent also argues claimant did not make a good faith effort to retain her post-injury employment and, consequently, claimant should not receive work disability benefits. Accordingly, respondent requests claimant's permanent partial general disability to be reduced to her five percent whole body functional impairment rating.

Conversely, excluding a typographical error concerning the task loss percentage, claimant asks the Board to affirm the Judge's findings and conclusions. Consequently, claimant asks the Board to correct the typographical error and increase her work disability to 53.75 percent.

The principal issue in this claim is the nature and extent of claimant's injury and disability. However, in considering that issue, the following ancillary issues must be addressed:

1. What functional impairment did claimant sustain due to the series of traumas that she suffered through April 30, 2001, while working for respondent?

2. Following the accident, did claimant make a good faith effort to retain her employment with Amoco?

3. If not, what wage should be imputed to claimant in analyzing her permanent disability?

4. Did claimant's post-injury wage while employed by Service Master during the period from June 24, 2002, through December 15, 2002, equal or exceed 90 percent of her pre-injury average weekly wage?

5. What is claimant's permanent partial general disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes, as follows:

Respondent, a formal wear company, hired claimant in March 2001 to hem and iron pants during a busy prom season. Consequently, while working 10-hour days during late April 2001 and while repetitively reaching overhead to hang and handle garments, claimant experienced pain in her right shoulder region. Claimant promptly reported those symptoms to her supervisor and began seeking medical treatment.

Claimant last performed her regular job duties with respondent in late April 2001. After commencing medical treatment, claimant performed light work for respondent for approximately four days. Shortly afterwards, in either May or June 2001, respondent laid off claimant. According to claimant, her last day of performing her regular work duties for respondent was on either April 28 or 30, 2001, and her last day of performing light duty work was approximately May 7 or 8, 2001.

After being released from medical treatment, claimant was unable to return to work for respondent as she had been terminated. Accordingly, claimant found other employment as a cashier for an Amoco service station earning $7 per hour working 32 to 40 hours per week. The parties agree claimant performed that job from November 15, 2001, through May 1, 2002, when she was terminated after taking time off from work to be with her daughter who was giving birth. The record does not disclose how many hours or days claimant missed from work.

In June 2002, claimant began working for another company, Service Master, cleaning clothing, furniture and other personal property from fire-damaged houses. In that job, which lasted about six months, claimant worked 25 to 30 hours per week earning $7.50, then $7.75 per hour. Claimant was terminated from that job on approximately December 15, 2002, for allegedly previously missing a day from work to attend the settlement conference held in this claim. According to pay records and testimony introduced at the regular hearing, claimant performed that work from approximately June 24, 2002, through approximately December 15, 2002.

At the time of the August 2003 regular hearing, claimant was unemployed despite looking for work. At that hearing, claimant introduced a list of 27 potential employers she had contacted in the previous seven and one-half months. Moreover, claimant was also in a state-sponsored job club that required her to contact 20 potential employers per week. However, as indicated above, the parties stipulated at oral argument claimant commenced employment with a local motel on August 25, 2003, earning $135 per week.

Claimant saw several doctors for both treatment and evaluation. One of the doctors, Dr. J. Mark Melhorn, provided claimant with conservative treatment before releasing her in early October 2001.

In July 2002, at her attorney's request, claimant saw Dr. Sergio Delgado to be evaluated for this claim. Dr. Delgado diagnosed impingement in claimant's cervical spine with radiculopathy that he rated as comprising a 15 percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The doctor reviewed a list of former work tasks prepared by vocational rehabilitation counselor Richard Santner and indicated claimant had lost the ability to perform 14 or 15 of the 34 work tasks (or approximately 44 percent) that claimant had performed in the 15-year period before her injury at work.

At the Judge's request, Dr. Paul S. Stein evaluated claimant in December 2002. Without further studies to confirm nerve root compression, the doctor diagnosed right shoulder and cervicothoracic strain, but suggested an MRI might be considered. Consequently, Dr. Stein rated claimant's whole body functional impairment at five percent. In his December 3, 2002 letter to Judge Moore, the doctor wrote, in part:

> Ms. Woodward developed symptomatology around the right shoulder, shoulder blade and neck as a result of repetitive overhead work activity more than two years ago. She continues to complain of pain in these areas. Her initial symptoms and pain drawings also indicate symptomatology radiating down the right arm, although she does not present much complaint in this regard to the present time. This distribution of discomfort as well as her EMG report are suggestive of a possible right cervical radiculopathy. However, there are no clear-cut findings on today's examination to suggest this and her sensory evaluation to the right upper extremity is clearly non-anatomic. Without further investigation the only diagnosis I can make it *[sic]* is right shoulder and cervico-thoracic strain. MRI scan of the cervical spine might be considered.
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> If MRI is not done, or if it is done and does not show definitive pathology consistent with nerve root compression on the right, [i]mpairment rating is provided using the AMA Guides to the Evaluation of Permanent Impairment, fourth edition. Based upon today's examination, and despite the EMG findings of two years ago, this patient does not have findings consistent with the definition of radiculopathy as noted on page 104, under the heading of DRE cervico-thoracic category III. She is therefore placed in DRE cervico-thoracic category II, 5% whole person impairment.
>
> Based upon her symptomatology, it would be best for Ms. Woodward to avoid repetitive activity with the right shoulder, particularly with the arm outstretched or overhead, and to avoid lifting more than ten pounds with the right arm.

The parties stipulated the task loss opinions of vocational counselor Michael J. Dreiling using Dr. Stein's work restrictions should be considered in analyzing claimant's task loss as if Dr. Stein had testified in this claim. Therefore, according to Dr. Stein, claimant has lost the ability to perform 11 of the 26 former work tasks (or 42 percent) that Mr. Dreiling found claimant performed in the 15-year period before sustaining the accidental injury to her neck and shoulder.

What is the nature and extent of claimant's injury and disability?

Because claimant has sustained an injury that is not included in the schedules set forth in K.S.A. 44-510d, she is entitled to receive permanent partial general disability benefits as defined by K.S.A. 44-510e. That statute provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute)

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than the actual wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

The Kansas Court of Appeals in *Watson*[4] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[5]

1. What functional impairment did claimant sustain due to the series of traumas that she suffered through April 30, 2001, while working for respondent?

The Judge found claimant sustained a five percent whole body functional impairment due to the work-related injuries to her neck and right shoulder. That rating was based upon the report of Dr. Stein, who evaluated claimant at the Judge's request and, thus, had no apparent incentive to provide anything other than an independent and unbiased opinion.

The Board finds no reason to disturb the Judge's finding that claimant sustained a five percent whole body functional impairment.

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[3] *Id.* at 320.

[4] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[5] *Id.* at Syl. ¶ 4.

2. Following the accident, did claimant make a good faith effort to retain her employment with Amoco?

As indicated above, when respondent did not accept claimant back to work she found other employment with an Amoco service station. Unfortunately, the service station terminated claimant after she took off work to be with her daughter who was giving birth. The Judge concluded claimant did not exercise bad faith and, therefore, did not abandon her job.

Rather than examining whether the claimant displayed bad faith in losing her job with the service station, the appropriate test is whether she established good faith in retaining that job. And the question of whether someone exercised good faith in retaining post-injury employment is examined on a case-by-case basis.

Claimant chose to take off work to be with her daughter who was about to give birth. Consequently, the service station terminated her. The record neither discloses the number of days claimant missed work to attend her daughter and grandchild or the necessity that claimant attend her daughter. Furthermore, the record fails to establish that claimant had obtained prior permission to leave work for the day or period in question. These facts do not establish a good faith effort to retain employment.

3. What wage should be imputed to claimant in analyzing her permanent disability?

As indicated above, the parties stipulated claimant earned $252 per week while working for the Amoco service station from November 15, 2001, through May 1, 2002. The record indicates that claimant would have continued to earn approximately $252 per week if she had not been terminated for taking off work to be with her daughter. Accordingly, $252 per week should be used as claimant's post-injury wage in the permanent partial general disability formula for the period commencing November 15, 2001, and continuing after the May 1, 2002 termination.

4. Did claimant's post-injury wage while employed by Service Master during the period from June 24, 2002, through December 15, 2002, equal or exceed 90 percent of her pre-injury average weekly wage?

On approximately June 24, 2002, claimant began working for Service Master. Claimant testified she was hired to work full time. Claimant, however, also testified she was hired to work 32 to 40 hours per week but she actually only worked 25 to 30 hours per week.

At the regular hearing, claimant introduced copies of her pay stubs from Service Master, which indicated she worked 15.75 hours (at $7.50 per hour) during the pay period ending June 30, 2002; a total of 69.25 hours during the pay period ending July 15, 2002; a total of 62.25 hours during the pay period ending July 31, 2002; a total of 55.5 hours (at $7.75 per hour) during the pay period ending August 15, 2002; and a total of 73 hours during the pay period ending August 31, 2002. There is a gap in the Service Master pay records and, thus, no hourly information until the records resume and show a total of 82.75 hours worked during the pay period ending September 30, 2002. There is another gap in the pay records and, therefore, no information until the records again resume indicating claimant worked a total of 18 hours during the pay period ending December 15, 2002.

The Board concludes claimant was hired as a part-time worker and, therefore, her post-injury wage while working for Service Master should be calculated by dividing the total wages she received from that company, $5,068.54, by the 25 weeks of employment. Consequently, the Board concludes claimant earned approximately $202.74 per week while working for Service Master, which is less than 90 percent of her pre-injury average weekly wage.

5. What is claimant's permanent partial general disability?

Under these circumstances, the Board concludes claimant's post-injury wage for purposes of determining her permanent partial general disability is the $252 per week she was earning while working for the Amoco service station. The $252 per week is representative of claimant's retained ability to earn wages as demonstrated by her ability to obtain part-time employment earning between $7 and $7.75 per hour. Therefore, the $252 should be imputed to claimant as her post-injury wage because she failed to establish she made a good faith effort to retain that employment. Consequently, had she not left work to be with her daughter, she would be continuing to earn that wage through the present. Accordingly, comparing the stipulated pre-injury wage of $338.90 to the post-injury wage of $252 yields a 26 percent wage loss.

The Board averages Dr. Stein's 42 percent task loss opinion with Dr. Delgado's 44 percent task loss opinion and concludes claimant sustained a 43 percent task loss. As K.S.A. 44-510e requires, the 26 percent wage loss percentage is averaged with the 43 percent task loss percentage, which produces a 35 percent work disability. Consequently, the Award should be modified.

AWARD

WHEREFORE, the Board modifies the November 26, 2003 Award to reduce claimant's work disability from 51.25 percent to 35 percent.

Susan L. Woodward is granted compensation from Jim's Formal Wear and its insurance carrier for an April 30, 2001 accident and resulting disability. Based upon an average weekly wage of $338.90, Ms. Woodward is entitled to receive 21.7 weeks of temporary total disability benefits at $225.94 per week, or $4,902.90, plus 142.91 weeks of permanent partial general disability benefits at $225.94 per week, or $32,289.09, for a 35 percent permanent partial general disability and a total award of $37,191.99.

As of June 15, 2004, Ms. Woodward is entitled to receive 21.7 weeks of temporary total disability benefits at $225.94 per week, or $4,902.90, plus 141.43 weeks of permanent partial general disability compensation at $225.94 per week, or $31,954.69, for a total due and owing of $36,857.59, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $334.40 shall be paid at $225.94 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully disagree with the majority's determination that claimant failed to make a good faith effort to obtain and retain employment post-accident. "Any inquiry into the good faith of an employee's efforts to find appropriate employment must proceed on a case-by-case basis."[6] Respondent terminated claimant from her employment because

[6] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, Syl. ¶ 3, 9 P.3d 591 (2000).

she was no longer capable of performing the job she had been performing before her work related injury. Respondent was unable to accommodate her restrictions. Following her release from treatment, claimant sought and found other employment. She performed that job until she was terminated for reasons that are not fully explained in the record. What is explained is that claimant informed her supervisor two months beforehand, that her daughter was pregnant and that claimant wanted to be with her daughter when she delivered her baby. Obviously, claimant could not predict the exact date this would happen. When claimant's daughter did go into labor, claimant notified her supervisor and even arranged for a co-worker to cover claimant's shift. It is unclear how long claimant was gone, but when she returned to work she was informed that she had been terminated. Claimant again sought other employment and was soon re-employed. Under these facts the undersigned Board Members cannot conclude that claimant failed to act in good faith.[7] Accordingly, pursuant to statute, we would utilize claimant's actual post-injury wages in determining her wage loss and permanent partial disability.[8]

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[7] *See e.g. Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800 (2003); *Cavender v. PIP Printing, Inc.*, 31 Kan. App. 2d 127, 61 P.3d 101 (2003).

[8] K.S.A. 44-510e.